Filed 12/6/04 In re J.E.H. CA1/2

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

In re J.E.H., et al., Persons Coming Under the Juvenile Court Law.	
CONTRA COSTA COUNTY BUREAU OF CHILDREN & FAMILY SERVICES, Plaintiff and Respondent, v. TAMMIE A., Defendant and Appellant.	A106693 (Contra Costa County Super. Ct. Nos. J02-01812, J02-01813)

Introduction

Tammie A. appeals from the findings and orders of the Contra Costa County Juvenile Court terminating her parental rights as to her daughter J.E.H. and ordering long-term foster care for her son B.E.H. (Welf. & Inst. Code, §§ 366.26, 395.)[1] We have recently decided appellant's appeal from March 26, 2004 interim orders of the juvenile court, suspending her visitation with both children and terminating her educational rights with respect to B.E.H. We affirmed those orders. (See *In re J.E.H.* (Oct. 29, 2004, A106074) [nonpub. opn.].)

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[1] All statutory references are to the Welfare and Institutions Code unless otherwise indicated.

On this appeal, appellant contends: The court erred in terminating appellant's parental rights as to J.E.H. on the grounds that substantial evidence did not support the court's refusal to find termination of parental rights would be detrimental to J.E.H. under the provisions of section 366.26, subdivisions (c)(1)(A) (parent has maintained regular visitation and contact and the child would benefit from continuing the relationship) and (c)(1)(E) (there would be a substantial interference with the child's sibling relationship as compared to the benefit of legal permanence through adoption). She also argues the juvenile court abused its discretion at the May 21, 2004 section 366.26 hearing when it continued to deny her visitation with B.E.H. Repeating claims that she raised and we rejected in her prior appeal, appellant further contends that substantial evidence did not support the court's March 26, 2004 order terminating her right to make educational decisions as to B.E.H.; that the court violated her constitutionally protected liberty interest in that right; and that substantial evidence did not support the court's March 26, 2004 order suspending visitation and phone calls between appellant and her children.

Facts and Procedural Background

We adopt the discussion of "Facts and Procedural Background" contained in our previous opinion in *In re J.E.H., supra,* A106074, at pages 2 through 8, as augmented by other information contained the record on that appeal and information received at the May 21, 2004 section 366.26 hearing.

A. Evidence relating to the sibling bond issue

At the time of the section 366.26 hearing, J.E.H. was eight years old and B.E.H. was seven years old. They had been raised together and were placed together from the initiation of dependency in August 2002 until October 3, 2002, when they were moved to separate placements in Solano County; they have not been placed together since October 2002. A memorandum prepared for the section 366.26 hearing explains that "[p]lacement [of B.E.H.] with his sister [J.E.H.] does not appear viable since the children were placed separately due to a history of sexual acting out between the siblings when previously placed together." They continued to visit each other at least once a month. Review reports, prepared in April and September 2003, stated that the children visited

each other two times per month. The report prepared for the disposition hearing stated: "Per reports from his previous foster home, [B.E.H.] did not appear on the surface to be particularly attached to his sister, in fact, the two of them often argued and hit each other." However, a March 2004 report states: "The children have enjoyed regular visits with each other, at least once a month. Initially they often argued and fought during the visits, but over the past year they have come to enjoy their time together. [J.E.H] has tried to comfort and reassure [B.E.H.] that he will never have to be scared of being hurt again." J.E.H.'s therapist, Susan Black, reported in October 2003 that "[J.E.H.] is a bright child who is wise beyond her years. [¶] . . . [¶] . . .[She] wants a home and a family (as long as she won't have to lose contact with her brother.)" Black "strongly recommend[ed] that the Court Terminate Parental Rights so that [J.E.H.] may move forward." (Original underlining.) The report prepared in March 2004 for the section 366.26 hearing reiterated that "[J.E.H.] has told her caregivers and social workers that although she is sad, she does not want to live with her birth mother and that she wants to be adopted by her long-time foster family as her 'forever' family, as long as she can continue to see [B.E.H.]"

An addendum report prepared by social worker Carole Rutherford for the section 366.26 hearing stated: "As noted in the original 366.26 Report . . . , [J.E.H.] has told her caregivers and social workers that she wants to be adopted by her long-term foster family, with whom she has lived since January 2003. This family, a licensed Foster Family Agency foster home, is committed to [her] and it is anticipated that their Adoptive Home Study will be completed and approved by the date of this hearing. Although termination of parental rights will sever the legal sibling relationship [J.E.H.] shares with [B.E.H.], their emotional sibling relationship will continue and the Bureau and [J.E.H.'s] caregivers are committed to continued sibling contact and visitation, recognizing its importance to [J.E.H.] as well as [B.E.H.] The fact that [B.E.H.'s] behaviors and placement issues are presently unsettled and more complex, and an adoptive family has not been identified for [him], should not prevent adoption being the preferred plan for [J.E.H.] The Bureau believes that the benefits she can gain through the security and

permanency of adoption outweigh any detriment to the severing of the legal sibling relationship. The Bureau respectfully recommends, for [J.E.H.], that parental rights be terminated so that she may be adopted."

At the May 21, 2004 section 366.26 hearing, social worker Rutherford was the sole witness. She testified that the children had lived together for their entire lives before they were detained in August 2002, and that they were placed together in the same foster homes until October 2002. They continued to visit together once or twice monthly since they were moved to separate placements. J.E.H.'s foster family wants to adopt her and J.E.H. loves the family. This prospective adoptive family "certainly [want the children to] have continued contact, but at this time, they don't feel it would be in either child's best interest to have placement together." During their visits, the children had " 'sibling squabbles,' " which Rutherford did not find unusual.

J.E.H. consistently told Black, her therapist, and her social worker, Nessa Wilk, that she wanted to be adopted by her foster family. The social workers had never spoken to J.E.H. directly about whether she wanted to be adopted if it meant losing contact with her brother. J.E.H. has always wanted to have contact with him. Rutherford opined that asking J.E.H. directly whether she would still want to be adopted if it meant she would never see her brother again, was not an appropriate question to ask an eight-year-old child. Rutherford also stated that the Bureau recognized there was an emotional relationship between the siblings, observing: "There's been concerns in the past that [J.E.H.] is—is rather parentified and worries both about her mother as well as her brother. But I think our responsibility is not necessarily to tell [J.E.H.] that she's never going to see her brother again or something. That doesn't seem to be the case." Rutherford also observed that in this case the Bureau's "responsibility is to say that we think that even if [J.E.H.] never saw her brother again that it's in her best interest to be adopted."

The social workers had discussed with the foster parents for both children whether the foster parents were willing to continue the visits between the siblings if J.E.H. were freed for adoption. Both J.E.H.'s foster (and prospective adoptive) parents and B.E.H's foster parents (who had decided they did not want to adopt him) agreed to try to continue

the sibling visitation. The social workers had discussed the idea of a post-adoption contact agreement with the foster parents, but believed that working on such an agreement should await B.E.H.'s being in an adoptive placement, so that his adoptive parents could be parties to any agreement.

B.E.H.'s counsel spoke of the foster parents' commitment to maintaining visitation between the children and stated that she did not object to J.E.H.'s adoption, although "[B.E.H.] does value the sibling relationship very highly." Counsel stated she had met with both foster mothers regarding continuing visits and they had both indicated a commitment to continue those visits. Counsel for J.E.H. reported that J.E.H. wanted to see her brother, "but I didn't consider that as a condition of adoption. She does want to be adopted." He recommended termination of parental rights as to J.E.H.

B. Appellant's objections to the recommendations

The Bureau recommended termination of parental rights as to J.E.H. and continued long-term foster care for B.E.H. with adoption as the ultimate goal. It also recommended that the court continue the March 26, 2004 order denying visitation or contact between B.E.H. and appellant on the grounds that such contact is detrimental to B.E.H. Counsel argued that there had been no evidence of changed circumstances since the court had made the no contact order and "nothing to suggest that if visits were permitted again that [appellant] would be either any more consistent in [visiting than she had been] or that she would refrain from saying or doing things that really distressed the children."

Counsel for appellant objected to the recommendation that the court continue the March 26, 2004 no-contact order between appellant and B.E.H., and to the recommendation that the court terminate parental rights as to J.E.H.

Specifically, as to the no-contact order, appellant's counsel argued there was a strong bond between mother and B.E.H. despite the lapse in visitation, and asked that the court "reconsider its no contact order and order therapeutic visits" or at least visits with limitations on contact in accordance with *In re Danielle W.* (1989) 207 Cal.App.3d 1227 and *In re Chantal S.* (1996) 13 Cal.4th 196.

Appellant's counsel's objection to termination of appellant's parental rights as to J.E.H. relied exclusively on the sibling relationship between the children and that "if the court finds that there's a substantial interference with the sibling relationship, . . . you would have the discretion not to terminate parental rights." Counsel argued that the possibility of post-adoption contact, or the current commitment of prospective parents to continue the sibling relationship, was insufficient to outweigh the other factors the court must consider in determining whether to invoke the exception to termination.

C. The court's findings

The juvenile court found that visits between appellant and B.E.H. would be "definitely detrimental" to him and ordered that there be no contact or visits until further order of the court. The court found J.E.H.'s need for a permanent home and stability was not outweighed by her need to see B.E.H. The court also and found by clear and convincing evidence that return of J.E.H. to her parent's custody would be detrimental, that it is likely she will be adopted and that termination of parental rights is in J.E.H.'s best interests. The court terminated parental rights as to J.E.H. Although stating that it did not find the visits between the siblings to be "so very important," the court nevertheless ordered that visits between the children occur at least once every two months, if possible.

This timely appeal was filed on May 28, 2004.

Discussion

I.

Appellant first argues that termination of her parental rights was erroneous as substantial evidence did not support the juvenile court's finding that the interference with J.E.H.'s relationship with her brother did not outweigh the benefit to J.E.H. of legal permanence through adoption, pursuant to section 366.26, subdivision (c)(1)(E). We disagree.

" 'Adoption, where possible, is the permanent plan preferred by the Legislature.' (*In re Autumn H.* (1994) 27 Cal.App.4th 567, 573.) If the court finds a minor cannot be returned to his or her parent and is likely to be adopted if parental rights are terminated, it

must select adoption as the permanent plan unless it finds termination of parental rights would be detrimental to the minor under one of five specified exceptions. (§ 366.26, subd. (c)(1); *In re Jamie R.* (2001) 90 Cal.App.4th 766, 773.)" (*In re L.Y.L.* (2002) 101 Cal.App.4th 942, 947.)

Subdivision (c)(1)(E) specifies as such an exception: "There would be substantial interference with a child's sibling relationship, taking into consideration the nature and extent of the relationship, including, but not limited to, whether the child was raised with a sibling in the same home, whether the child shared significant common experiences or has existing close and strong bonds with a sibling, and whether ongoing contact is in the child's best interest, including the child's long-term emotional interest, as compared to the benefit of legal permanence through adoption. [¶] If the court finds that termination of parental rights would be detrimental to the child . . . , it shall state its reasons in writing or on the record." (§ 366.26, subd. (c)(1)(E).)

"Because the contention asserts inadequate evidentiary proof, we apply the substantial evidence standard of review. (Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2001) ¶ 8:88, p. 8-33; see also *In re Autumn H., supra,* 27 Cal.App.4th at p. 575.) [¶] The issue of sufficiency of the evidence in dependency cases is governed by the same rules that apply to other appeals. If there is substantial evidence to support the findings of the juvenile court, we uphold those findings. [Citation.] We do not evaluate the credibility of witnesses, reweigh the evidence, or resolve evidentiary conflicts. Rather, we draw all reasonable inferences in support of the findings, consider the record most favorably to the juvenile court's order, and affirm the order if supported by substantial evidence even if other evidence supports a contrary conclusion. (*In re Autumn H., supra,* 27 Cal.App.4th at p. 576.) The appellant has the burden of showing the finding or order is not supported by substantial evidence. [Citation.]" (*In re L.Y.L.*, *supra,* 101 Cal.App.4th at p. 947; *In re Lorenzo C.* (1997) 54 Cal.App.4th 1330, 1343-1345.)

To show substantial interference with a sibling relationship, appellant must show the existence of a significant sibling relationship and then show that severance of the

relationship would be detrimental to J.E.H. The court considers the factors set forth in section 366,26, subdivision (c)(1)(E), in determining the significance of the relationship. (*In re L.Y.L., supra,* 101 Cal.App.4th at p. 952.)[2] Here, J.E.H. and B.E.H. had lived together from his birth until October 2002, shared significant common experiences in their home, and evidenced a bond, with J.E.H. expressing the desire to continue to have contact with her brother. Nevertheless, in considering these factors, the juvenile court did not determine that the bond was so significant that its severance would be detrimental to J.E.H. Rather, it concluded that the children "shared some very bad experiences that I don't think establish any great bond." The court expressed worry about the sexual acting out and observed that it did not think the bond was great because they fought at visits.

This case is similar in many respects to *In re L.Y.L., supra,* 101 Cal.App.4th 942. In that case, the children had lived together most of their lives, had a relationship which the social worker characterized as "close," and L.Y.L. expressed that she would be "sad" if she could not see her brother and would miss him and worry about his safety. (*Id.* at p. 952.) Nevertheless, the appellate court concluded the parent had failed to show that L.Y.L. would suffer detriment if the relationship ended and had failed to sustain her burden of proof that termination of her parental rights to L.Y.L. would substantially interfere with L.Y.L.'s sibling relationship with her brother. (*Ibid.*) Here, although the evidence supporting the court's conclusion that the bond between the children was not significant and that severance would not prove detrimental to J.E.H. may not have been strong, such evidence nevertheless satisfied the substantial evidence standard.

Moreover, even were we to conclude that substantial evidence did *not* support the court's finding that the sibling relationship was not so strong that its severance would cause J.E.H. some detriment, we would affirm the order on the basis that the court properly weighed the benefit to J.E.H. of continuing the sibling relationship against the

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[2] "[T]he court may reject adoption under this sibling relationship provision only if it finds adoption would be detrimental to the child whose welfare is being considered. It may not prevent a child from being adopted solely because of the effect the adoption may have on a sibling." (*In re Celine R.* (2003) 31 Cal.4th 45, 49-50.)

benefit to her that adoption would provide. (See *In re L.Y.L., supra,* 101 Cal.App.4th at pp. 952-953.) The court expressly found that J.E.H.'s need to see her brother was strongly outweighed by her need for the stability of a permanent home. "She definitely needs [a permanent home], craves it, wants it, and is asking for it." This determination was amply supported by substantial evidence in the record of J.E.H.'s desire to be adopted by her foster family, by observations and the recommendations of her therapist, the social workers, and her own counsel. Even B.E.H.'s counsel did not object to J.E.H.'s adoption. In such circumstances, the court acted within the proper scope of its discretion. "Substantial evidence supports the court's conclusion that the benefits of adoption outweighed the benefits of . . . continuing [J.E.H.]'s relationship with [her brother], even if it be assumed that termination of parental rights would result in a substantial interference with the sibling relationship." (*In re L.Y.L., supra,* at p. 953; accord, *In re Jacob S.* (2002) 104 Cal.App.4th 1011, 1018; *In re Megan S.* (2002) 104 Cal.App.4th 247, 252.)[3]

II.

Appellant contends on appeal that substantial evidence does not support the juvenile court's failure to find the exception set forth in section 366.26, subdivision (c)(1)(A), providing an exception to termination where "[t]he parents . . . have maintained regular visitation and contact with the child and the child would benefit from continuing the relationship." The court never made any express finding with regard to subdivision (c)(1)(A).

Appellant has clearly waived the right to raise this contention on appeal by failing to raise the issue in the juvenile court at trial. (*In re Rachel M.* (2003) 113 Cal.App.4th 1289, 1295 [appellant must have raised exception under section 366.26, subdivision

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[3] Although we have assumed for the purposes of our analysis that the adoption of J.E.H. would completely sever her relationship with B.E.H., it is worth noting the complete absence of any evidence that the relationship of the two will cease upon termination of parental rights as to J.E.H. and her adoption. Both her prospective

(c)(1)(D)]; *In re Erik P.* (2002) 104 Cal.App.4th 395, 402-403 [applying the rule to failure to raise exception in section 366.26, subdivision (c)(1)(E).) "The juvenile court does not have a sua sponte duty to determine whether an exception to adoption applies. [Citations.] The party claiming an exception to adoption has the burden of proof to establish by a preponderance of the evidence that the exception applies. [Citations.]" (*In re Rachel M.,* 113 Cal.App.4th at p. 1295.) Appellant does not contend that she properly raised the issue below.

In any event, were we to reach the issue, the record here contains virtually no support for the application of the exception provided by section 366.26, subdivision (c)(1)(A). As we observed in our previous opinion, "Appellant's dismal visitation history, even in the very unlikely event of regular and positive visitation occurring during the two months before the section 366.26 hearing, make it a virtual certainty that the exception could not be invoked." (*In re J.E.H., supra,* A106074, at p. 9.)

III.

Appellant contends the juvenile court abused its discretion at the May 21, 2004 section 366.26 hearing in ordering that she have no contact or visitation with B.E.H. At the section 366.26 hearing, the court expressly found visits between appellant and B.E.H. to be detrimental and ordered "[u]ntil further order of the court, there will be no visits." The court explained that it had considered appellant's "inability to follow through on visits, the fact that she would set visits and not show up." The court referred to the reports it had received throughout the proceedings, specifically referring to the October 9, 2003 report relating that appellant did not "show up for a long time and then she does—each time the children were brought to Aspira expecting to see their mother they were disappointed. So she'd promise visits and not show, and then they'd expect phone calls and she wouldn't call. She didn't follow through on telephone calls after informing her children that she will call. They became disappointed and upset. [¶] And frankly, I'm

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adoptive family and B.E.H.'s foster family have stated their commitment to maintaining visitation between the pair and a court order continues visitation between the two.

not going to expose [B.E.H.] to one more bit of this for now. I think the boy is quite vulnerable. I think he's been through a lot. He's had some terrific disappointments. I lay most of those disappointments from what he learned from his parents and his acting out and his lack of structure and his frustration."

The Bureau contends that appellant waived her right to challenge the no-contact order, because she simply asked the court to reconsider its earlier decision, from which she had already taken an appeal. In our previous opinion, we characterized the order suspending visitation as one "of a temporary and short term duration . . . ." (*In re J.E.H., supra,* A106074, at p. 9.) Although it is true that appellant's counsel asked the court to "reconsider" its initial order, the record makes clear that the Bureau was asking the court to continue or extend the order and that appellant was objecting to that order. We conclude appellant did not waive her right to challenge the May 21, 2004 no visitation order.

On the merits, we conclude that the order was amply supported by the evidence. Appellant argues that section 366.26, subdivision (c)(4), states that when the court is ordering long-term foster care as the permanent plan, it "shall also make an order for visitation with the parents or guardians unless the court finds by a preponderance of the evidence that the visitation would be detrimental to the physical or emotional well-being of the child." (§ 366.26, subd. (c)(4)(B).) The court clearly found contact with appellant to be detrimental to B.E.H. The evidence of detriment to B.E.H. before the court was the same as that we held sufficient to support the order in the previous appeal, whether measured by the abuse of discretion standard or the substantial evidence standard. We said there: "That decision was amply supported in this record by the social worker's report that appellant's visitation history was very poor, that she had broken promises to B.E.H. that she would visit, that he had been deeply upset by appellant's phone call wherein, while apparently under the influence, she had assured him that she would come to get him so that they could live together. The court could conclude that B.E.H.'s serious behavioral problems that occurred in the month following this phone call, although attributable to a variety of factors (including the failed visit with a prospective

adoptive family), were also attributable in substantial part to appellant's dismal contact and visitation history. The court was also entitled to give great weight to the opinion of B.E.H.'s treating psychologist that B.E.H.'s visits with his mother had 'a regressive impact on his subsequent functioning [at] home and in his therapy sessions. It is my expectation that future maternal visits will have similar regressive effects upon his functioning.' " (*In re J.E.H., supra,* A106074, at p. 13.)[4] Substantial evidence supports the May 21, 2004 order continuing to deny appellant visitation with B.E.H.

IV.

Appellant argues that the juvenile court's order at the March 26, 2004 hearing terminating her right to make educational decisions for B.E.H. was unsupported by substantial evidence and violated her constitutional liberty interest in controlling her child's education. She acknowledges that these claims are the same ones raised in her previous appeal. We considered and rejected these claims in the prior appeal. (*In re J.E.H., supra,* A106074, at pp. 14-16.) As such, those determinations are the law of the case. (*Kowis v. Howard* (1992) 3 Cal.4th 888, 893; *Clemente v. State of California* (1985) 40 Cal.3d 202, 211-212.) We shall not reconsider these claims on this appeal.

V.

Similarly, in the previous appeal, we considered and rejected appellant's claim that the court's order suspending visitation and telephone calls between appellant and her children was error. (*In re J.E.H., supra,* A106074, at pp. 9, 12-13.) That decision

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[4] If anything, the evidence before the court at the May 21, 2004 hearing was even more persuasive that contact would be detrimental to B.E.H. Not only did B.E.H.'s emotional condition continue to be fragile, but appellant's situation was even less stable than indicated to the court at March hearing. On March 20, 2004, appellant had been *discharged* from the residential treatment program she had entered on February 17, 2004, because she had tested positive for drugs. On April 30, 2004, appellant had given birth prematurely to a son who has significant medical challenges. There was no indication whatsoever that appellant would be any more reliable or appropriate in any visitation and contact with B.E.H. than she had been previously.

constitutes the law of the case and we shall not reconsider it. (*Kowis v. Howard, supra,* 3 Cal.4th at p. 893; *Clemente v. State of California, supra,* 40 Cal.3d at pp. 211-212.)

Disposition

The judgment is affirmed.

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Kline, P.J.

We concur:

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Haerle, J.

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Ruvolo, J.